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In the Supreme Court of the United States

OCTOBER TERM 1962

No. [redacted]9 199

FRANK T. BELL,
Petitioner,

v.

STATE OF WASHINGTON,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of the State of Washington

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COMES NOW Frank T. Bell, petitioner, by and through his attorney, and respectfully prays the Court that a Writ of Certiorari shall be issued to review the judgment of the Supreme Court of the State of Washington entered on March 30, 1962, denying the Petition for Rehearing of this Petitioner and, therefore, affirming the judgment of conviction of Petitioner.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Washington is set forth in the Appendix, *infra*, page 27a, and may be found in 368 P. 2d, 177,

The whole of the text of the Memorandum Opinion of the judge of the superior court holding that the Petitioner was guilty of perjury is incorporated in the

opinion of the Supreme Court of the State of Washington, and is found at pages 182-186 of 368 P. 2d and at pages 34a-43a of Appendix A.

JURISDICTION

The jurisdiction of this Court is invoked under 28 USC, Sec. 1257(3) to review the denial of the petition of Petitioner for a rehearing of the judgment of the Supreme Court of the State of Washington affirming Petitioner's conviction of perjury.

On March 26, 1962, the Supreme Court of Washington denied without opinion this petition for rehearing of its judgment against Petitioner.

QUESTIONS PRESENTED

1. Where the trial judge admitted, over Petitioner's repeated objections, a great mass of highly prejudicial evidence relating to transactions in nowise connected with the indictment for perjury, and where the trial judge demonstrated by his opinion and findings that this prejudicial evidence influenced his decision of guilt, and where the appellate court refused to consider the many assignments of error based on the admission and consideration of this prejudicial evidence on the ground that the trial judge was presumed not to have considered this prejudicial evidence, is not this refusal of the appellate court to pass on these assign-

ments of error a denial of due process under the 14th Amendment to the Federal Constitution?

2. Was it Due Process for the trial judge to violate the secrecy of the grand jury by permitting the prosecution to introduce into evidence *all* of the testimony of Petitioner before the grand jury, the great bulk of which had no pertinence to the charge of perjury, but pertained to suspicions of misconduct between the contractor and the manager of the PUD, while at the same time excluding Petitioner's counsel from any inspection of the grand jury's proceedings and minutes relating to Petitioner's testimony?

FEDERAL QUESTION COULD ONLY BE PRESENTED BY PETITION FOR REHEARING.

EXHAUSTION OF REMEDIES.

Petitioner rightfully expected that his assignments of error respecting the illegitimate use of prejudicial evidence, and the violation of the secrecy of the grand jury would be heard and considered by the Supreme Court of Washington, and was greatly surprised when that Court refused to hear or pass on them. Thus, Petitoner's first opportunity to present these federal questions could only arise on his Petition for Rehearing.

We have made the Petition for Rehearing a part of the record transmitted to this Court so that your Honors will see that the primary issue raised by our

Petition. (Pet. pp. 3, 10-21) is the issue of due process under the Fourteenth Amendment, because the Supreme Court of Washington refused to review the trial court's action in admitting wholesale, massive prejudicial evidence of the alleged misconduct among the contractor, McLean and the manager of the PUD, just as if this were a conspiracy trial rather than a trial for perjury.

When that Petition for Rehearing was denied, Petitioner had exhausted all remedy in the State Courts and had no recourse but to appeal to this Court for Writ of Certiorari.

STATUTE INVOLVED

Title 28 USC, Section 1257(3) :

> ". . . Final judgments or decrees rendered by the highest courts of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> ". . .
>
> "(3) By Writ of Certiorari . . . where any title, right, privilege or immunity is specifically set up or claimed under the Constitution . . . "
> June 25, 1948, C 646, 62 Stat. 929."

STATEMENT OF THE CASE

In the middle fifties, Grant County, loc. d in the Columbia Basin desert, small in population and resources, but great in ambition, at the instance of a

group of its leading citizens, of whom Petitioner was best known on the national scene, undertook and carried to successful completion a $100 million hydroelectric plant by means of the creation of a Public Utility District (herein referred to as the "PUD"). (R. p. 4).*

Petitioner had taken a foremost part in promoting this vast enterprise, making repeated trips to the national capital, and elsewhere, to secure authorization. He received no compensation and in substantial part these trips were taken at his own expense (R. pp. 134-136, 138, 149, 187, 971-978).

Thereafter, while the hydroelectric plant was under construction, a controversy, if not a feud (R. pp. 8-10), broke out between Nat Washington, state senator and counsel for the PUD, and Glen Smothers, by then the general manager of the PUD.

Rumors gained currency that corruption was afoot between the general contractor and the PUD'S manager, Glen Smothers, who had accompanied Petitioner to Washington on at least one of his trips. These rumors created widespread, red hot indignation in this community and resulted in the calling of a grand jury.

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*Page references preceded by "R" are to the record of the testimony; those preceded by "Tr." are to the transcript of the pleadings, etc.; those preceded by "A" are to the Appendix of this Petition.

In the course of the grand jury's extended deliberation, it became known to Petitioner that his name had been involved in the testimony submitted to it. Thereupon, on November 5, 1958, Petitioner voluntarily appeared before the grand jury, offered to testify, signed a waiver (R. pp. 68-9, 981) and brought with him sundry cancelled blank checks that he thought would bear on his testimony (R. p. 69). These checks represented certain fees paid by Petitioner to Glen Smothers as an engineer.

On being assured that the grand jury's deliberations were and would remain secret (R. p. 74), Petitioner testified freely as to all inquiries made of him by the special prosecutor, assisting the grand jury (R. pp. 68-103).

Since Petitioner was thus testifying before the grand jury, it is obvious that he did not have the benefit of legal counsel, but was strictly on his own. On March 13, 1959, Petitioner was recalled by the grand jury and again voluntarily appeared and gave further testimony in harmony with his earlier testimony (R. pp. 228-303, 982-984). At the time, Petitioner was 76 years of age (R. p. 971) and had lived for more than half a century in Grant County, save when in the service of the federal government where he occupied the eminent position of Director of the Bureau of Fisheries for ten years (R. pp. 971-3). He had earlier served as county treasurer and had borne an honored name (R. pp. 396, 971-3). His testimony, taken as a whole, shows that he

suffered from the usual infirmities of advanced age, such as being quite hard of hearing, and forgetful of names.

This grand jury was in session sifting these charges for many months. Seemingly it never uncovered enough evidence to warrant indictment of either Smothers or the contractor, so vented its frustration by indicting Petitioner for perjury. Gossip, like death, "loves a shining mark," so the grand jury struck at the region's foremost citizen.

Petitioner was indicted by the grand jury on five counts of perjury. The first three counts of this indictment variously charged that Petitioner had testified before the grand jury that he was employed by McLean Finance & Improvement Company of New York (herein referred to as McLean) to investigate a project in Juneau, Alaska, and several other projects, and that he received payment for his services and travel expenses by McLean in the sum of $5,568.49. So much of Petitioner's testimony was not contradicted. But he further testified that one Lewis M. Schott employed him on behalf of McLean, explaining that Schott was an official or agent of McLean, and that he and Petitioner agreed on the amount of his compensation. At the trial, Schott testified that he did not so employ Petitioner, that he, Schott, was not an officer or agent of McLean and that he had not agreed with Petitioner on the amount of his compensation. This conflict of testimony raised one of three infer-

ences: Either that aged Petitioner's memory was faulty as to the man; or that Schott was failing to tell the truth; or that Petitioner was using Schott's name to hide the identity of someone else and, in this particular, was testifying falsely, App. A, p. 30a).

The two remaining charges of the indictment charged that Petitioner had testified that he had received $6,500 as a finder's fee or as a commission from Shoup Voting Machine Company for sales of voting machines in Clark County, Washington, and in Portland, Oregon. It was not denied by any of the testimony that Shoup Voting Machine Company did pay $6,500 to Petitioner, which, Petitioner testified, was paid him as a finder's fee. Count 4 of the indictment charged that it was not true that Petitioner received the check as a finder's fee, and Count 5 charged that it was not true that Petitioner received the check as a commission on a sale, although Petitioner had claimed it no more than a finder's fee for finding potential customers in these areas (App. A, p. 32a).

The testimony ostensibly contradicting Petitioner on these five counts was given by the witnesses Schott and Joseph Rosenbaum. These two men were long time friends of Petitioner and supposed themselves to be correcting some sort of mistake made by Petitioner.

In his opinion, the trial judge has said of the testimony of these two witnesses, on whom the prosecutor relied, as showing perjury:

> "Now, I do not believe everything that Mr. Rosenbaum said and I do not believe everything that Mr. Schott said; I am highly suspicious of Mr. Rosenbaum." (App. A, p. 42a).

These charges of corruption had been so sensational and so repeatedly aired in the local papers that Petitioner's counsel saw that it would be impossible to impanel a jury free of the regional prejudice thus created, so a jury was waived, and a trial judge from another part of the state was sent in to try the case.

The county also brought in from the outside an experienced criminal prosecutor, and a most extraordinary method of seeking conviction was adopted by him. Presumable because the evidence of perjury was both weak and of dubious import, the prosecutor ransacked the grand jury's proceedings for instances of alleged "gifts and gratitudes" that, undenied or unexplained, involved Smothers and the contractor and put them in evidence. It was not claimed that any of these incidents had anything whatever to do with the charge of perjury. They were used by this astute and ingenious prosecutor to show the "materiality" of the alleged false testimony of Petitioner. Then, once in evidence, the huge volume of this evidence comprising over 1,200 pages of testimony and 280 pages of pleadings, court orders, etc., was ruthlessly and skillfully used to smear Petitioner as one of the conspirators who defrauded the PUD, though the testimony relevant to perjury was less than one sixth of the total.

We set forth in Appendix B four leading transactions thus used. Since their irrelevance to the charge of perjury has at no time been challenged, though they occupy so large a part of the record, they need not encumber the text of this petition, but are nevertheless useful to show to what great lengths this conspiracy charge was carried, to blacken Petitioner in the eyes of the trial judge.

These incidents, linked together, have all the fascination of a detective story, told by a master hand. Was there bribery and corruption going on? If so, then punishment should be meted out to some one.

The vice of this method of persuation is, of course, that only one side of these transactions was exposed to view. The defense of the principals in them, Smothers and the contractor, was never heard, nor was Petitioner permitted to controvert or explain any of them. As the trial judge pointed out many times in ruling in their admissibility, their truth or falsity was not in issue. They were admitted for a single, narrow purpose to prove materiality of the alleged perjury. Petitioner was convicted, in the eyes of the trial judge, of being a "conspirator" with the contractor and its agents in an attempt to defraud the PUD, and thus would, no doubt, testify falsely. That the conspiracy itself was not legitimately proved, that counter evidence to show innocence was neither received nor receivable escaped the attention of the trial judge.

On appeal to the Supreme Court of Washington from this verdict, where the Court's attention was challenged to this prejudicial evidence and its use, the Supreme Court several times applied a presumption that the trial judge disregarded this inadmissible evidence and therefore refused even to consider its prejudicial and inadmissible character. This, in spite of the fact that, as we shall see, the trial judge frankly admitted that he had taken it into consideration.

This presumption that the trial judge disregards inadmissible evidence, as this court well knows, had its origin in equity where, on appeal, the case was heard de novo. This presumption has gradually infiltrated civil cases, when the appellate court can see that the admissible evidence fully supports the conclusion of the trial court. Of late even in a few criminal cases it has been used, but always with great caution, where the appellate court can see that no damage to a defendant has resulted from the admission of such questioned evidence.

Medical science has discovered that strychnine, administered in minute doses, is of value as a heart stimulant, but in larger doses it kills. So, here. The farthest stretch of this rule thus far reached in any of the cases is that the trial judge will be presumed to have considered only relevant and admissible evidence where the challenged evidence is tiny in amount and on the periphery of admissibility.

But if this precedent established by the Washington Court receives the blessing of this court by denial of the Writ, the damage that will result in innumerable cases is incalculable, once trial judges, even in criminal cases, are given a blank check, are in effect told that they may admit prejudicial evidence in any amount, without fear of reversal, since appellate courts will presume their infallibility in disregarding it, even when they are incautious enough to admit they were influenced by it.

This, it seems to us, is a most flagrant deviation from the rule that American Courts are vigilant to see that every accused has a fair trial, in which due weight to the presumption of his innocence is maintained until he is proved guilty beyond a reasonable doubt, without the use of irrelevant and prejudicial evidence that can so often convict an innocent man, once the bars are let down and everything that an astute prosecutor offers is admitted.

REASONS FOR GRANTING THE WRIT

1. Supreme Court's Presumption of Infallibility of Trial Judge as a Denial of Right of Appeal.

In Appendix A, where we have placed the opinion of the Supreme Court of Washington in this case, containing the opinion also of the trial judge, we have caused to be printed in italic type each of the several statements of the Court that it will presume, in a trial to the Court without a jury, "that the trial judge did

not consider immaterial evidence in reaching his decision." (App. A, pp. 51a, 56a, 61a, 62a, 63a).

This great mass of prejudicial evidence was presented to the Court in 69 assignments of error, ranged in groups, and each was met by the Supreme Court's use of this presumption.

What makes this refusal of the Court to consider these assignments of error more serious and gives to it a wide significance in future trials is the Court's extension to criminal cases of the presumption in equity, as stated in *Deginger v. Martin*, 48 Wn. 1, 92 Pac. 674, that whenever any case, hereafter, civil or criminal, is tried to the court without a jury, it is suggested to the trial judges that

> ". . . a liberal practice should be adopted in admitting evidence so that this court, in the event of an appeal, will on a trial *de novo* have all material facts before it." (App. A, p. 62a).

To extend this rule of equity, where the case is tried de novo on appeal, to criminal cases is most dangerous to the liberties of any accused, who is compelled, as was this Petitioner, to submit his case to the tender mercies of the trial judge. Is it possible that this court will hold this presumption of infallibility of all trial judges to be due process, in a criminal case, thus to encourage ambitious prosecutors to strain every nerve to drag prejudicial evidence into such a case, to get a conviction, then, once the evidence is laid before the trial judge, to have the appellate court blandly remark: "We must

presume that the trial judge didn't consider this evidence?"

But there is even a more serious question for the Petitioner involved here. For the Washington Supreme Court, in line with numerous decisions in civil cases, both state and federal, does approvingly quote from *State v. Ryan*, 48 Wn. 2d, 304, 308, 293 Pac. 2d, 399, where this presumption was applied, the qualifying phrase (App. A, p. 63a):

> "Unless it appears that the findings are based on the evidence which should have been excluded."

This is precisely our major point! The opinion of the trial judge, and his findings demonstrate beyond question that the trial judge did take into consideration this prejudicial evidence, not just for materiality of the alleged perjury, for which alone it was deemed admissible, but for the purpose of reaching his decision on the merits, where his findings and oral opinion demonstrate that it importantly influenced his decision.

In such a case as this, where such a huge volume of highly prejudicial evidence had been admitted, allegedly merely to show materiality of the perjury, we would naturally expect some disclaimer by the court that he had considered it solely for that purpose, that he was placing his decision solely on the admissible testimony. But not only is there no such disclaimer,

but, after two pages of general remarks, the trial judge, in his opinion, frankly states:

> "I come now to a brief analysis of the evidence in this case which I think is material to the decision which I have reached. . . .
>
> "As I stated in ruling early in the case, the only fair way to analyze testimony in a charge of this nature is to read *all of it* so that it cannot be read out of context, and I have *read and reread* the testimony in this case carefully . . ." (emphasis supplied) (368 Pac. 2d, 184; App. A, p. 39a).

Even if there were not other confirmatory evidence in the opinion and in the trial judge's findings that he did consider this prejudicial testimony, this would suffice to demonstrate that the court gave substantial weight to this prejudicial evidence.

An exact parallel for the statement of the trial judge in this case is found in *Fotie v. U. S.*, 137 F. 2d 834, 840, where the Court said:

> "The judge's statement that the great mass of testimony had been placed in his hands, and he had studiously gone through all of it justifies the inference that he took into consideration and gave weight to the inadmissible testimony. . . ."

Accordingly, the U. S. Court of Appeals for the 8th Circuit reversed the conviction.

This statement is particularly applicable here, where the testimony relevant to perjury is so little, and the mass of prejudicial evidence is so great.

Again, the trial judge twice in his opinion referred to Petitioner's involvement in a conspiracy, commenting both times on

> ". . . the peculiar problem presented by the circumstances of this case which have forced the State to reply upon the testimony of two men who, their evidence suggests, are fellow conspirators . . ." (368 Pac. 2d, 183, 185; App. A, p. 37-8a, 41a).

It seems to us plain that it was this reading of "all" of the testimony that convinced the trial court that Petitioner was a "conspirator" and that the two State witnesses were his "fellow conspirators." Could there be any greater manifestation of the poisonous result of this prejudicial testimony? Why, then, does the trial judge accuse Petitioner of being one? The logic of this twice repeated charge that Petitioner was a conspirator would seem to be that, if he is a conspirator, then the judicial surmise that he is guilty of perjury hardens into conviction when the judge considers his guilt as such conspirator — a crime of which he was not accused, where he had not been allowed to defend.

The trial judge having said that he had read and reread all of the evidence, in his next paragraph remarked:

> "As I read the testimony I could sympathize with the grand jurors and I would subscribe to their comments that the story he was telling them was improbable, almost an insult to their intelligence." (368 Pac. 2d, 184-5; App. A, p. 40a).

The only time when members of the grand jury interrupted Petitioner's testimony to say that the story he was telling them was "improbable" is when in Petitioner's testimony before the grand jury he was giving them his account of his investment in Agencia Industrial (R. pp. 173, 179). Manifestly, the testimony of Agencia Industrial was introduced to prejudice the trial judge. Plainly, it had that effect.

We have made a most extensive research and believe that we have examined every case, state and federal, where this presumption that the trial judge disregards inadmissible evidence was applied. We have not found one — NOT ONE! — where the prejudicial evidence admitted was so massive in amount, so prejudicial in character, and where the trial judge frankly admitted his reliance on that prejudicial evidence.

In the concluding paragraph of his opinion the trial judge went further to comment on this prejudicial evidence (summarized in App. B.), as follows:

> "I agree with the prosecution that the circumstances concerning the obtaining of the $87,000 fee . . . I agree with the prosecution that the circumstances as explained in this court room are highly suspicious. I agree with the prosecution that the circumstances of giving of the diamond drilling contract to the so-called McLean Engineering Company are even more suspicious, and I agree with the prosecution that the fact that one-half of the $6,500 fee in connection with the voting machines, one-half of which found its way into Mr. Smother's pocket . . . is also highly suspicious." (App. A, p. 42a).

In the language of everyday life what the trial judge is saying is: Here is dirty money, here is skulduggery, here is crookedness that deserves to be punished. By considering this testimony judicial wrath was raised, and since neither Smothers nor McLean nor the contractor were before the court, that wrath struck at the unfortunate Petitioner, the one man who had nothing to do with either the Extra Work Orders or the Lynch-McClintock subcontract, or the McLean transaction, all summarized in App. B.

Surely it cannot be denied that the trial judge, in voicing these suspicions and saying that he agrees with them is demonstrating that he considered all this highly inadmissible and prejudicial evidence, and that he was influenced against Petitioner by it. Furthermore, in App. B there are contained five paragraphs and four subparagraphs of the findings of the trial judge relating to these wholly irrelevant episodes there recited which had nothing to do whatever with the perjury. In fact, reading the opinion as a whole, it appears that it is drenched with the trial judge's views of this prejudicial testimony, on which alone the Petitioner was supposed to have been tried.

2. Petitioner Entrapped by Introduction of this Presumption After Petitioner's Election to Waive Jury Trial.

The decisions of the Supreme Court of Washington demonstrate that prior to *this* decision by the Appellate Court, there had never been the slighest intimation

in any of its decisions that this presumption of equity that the trial court does not consider inadmissible evidence could or would be used in a criminal case.

When the critical decision was made by Petitioner to submit his case to the court without a jury, he had every right to expect that the same rules of evidence would be applied by the court sitting without a jury as would be applied in a jury trial.

It is unthinkable that any judge would admit this great mass of prejudicial evidence before a jury. When, without the slightest warning, the Supreme Court of Washington introduced this drastic change in a criminal case for the first time after Petitioner's conviction, is not this, of itself, a violation of due process?

Petitioner would never in the world have consented to such a trial by the court alone if he could have foreseen that this vast mass of prejudicial evidence would be admitted, so highly damaging to his defense. Yet, by this announcement of this rule *for the first time* in a criminal case, Petitioner is entrapped. He suffers a mortal blow to his freedom from this radical innovation, that so greatly broadens the admission of evidence, vitally damaging to him because he has been denied the right to defend against it.

3: Far More is Involved than the Liberty of this Petitioner.

A reading of *Irvin v. Dowd*, 366 U. S. 717, where this Court reversed a conviction solely because of the widespread knowledge by the jury of the publicity

given to the crime, demonstrates that this Court is keenly sensitive to the way in which sensational publicity creates so hostile a climate in a whole region that it is impossible to obtain an unprejudicial jury to try the accused.

This experienced court will recognize, too, that a conspiracy scandal, dealing with public funds, is especially damaging to every man accused of participation, though his only involvement may be in business or social friendship with one of the principals.

Where, as with this Petitioner, an accused is so convinced of his innocence that he abandons that most precious right, trial by jury, and submits his defense to the court alone, should not such a trial have all the safeguards normally attaching to a jury trial? For judges are human and if their minds are subjected to prolonged saturation in highly prejudicial evidence, they can react to it as did the trial judge here.

Thus, where the appellate court, as in this case, establishes the rule that the trial court in criminal cases should be liberal in admission of prejudicial evidence (by it politely called "immaterial"), with the assurance that the appellate court will presume that the trial judge was infallible in disregarding all of it, (App. A, p. 62a) a trial by the court alone becomes a trap for the unwary in a criminal case. On the other hand, no lawyer acquainted with this precedent could permit his client to run such gauntlet of prejudicial evidence as was here admitted.

Dare we permit this one door of escape, trial by the court alone, to be slammed shut against any accused, the helpless victim of widespread prejudice, when that prejudicial evidence can be permitted to flow, like a surging river, over all the evidence material to the accusation?

This case is unique, it breaks new ground, in the extent to which it opens the door to prejudice, then closes it on appeal. In the interest of a fair trial, so precious to the life and liberty of the citizen, does it not call for the most careful consideration by this tribunal, through the granting of the Writ?

4. Is it Due Process for an Appellate Court to Refuse to Hear or Decide the Major Questions Submitted.

On this point we submit the following cases as illustrative of this position:

In *Griffin v. Ills.*, 351 U. S. 16, this Court held that a State Supreme Court denies due process in a criminal appeal when it fails to provide the impecunious appellant with a transcript of the record, pointing out that when the right of appeal exists, there must be no discrimination among those convicted of crime — all must be heard. On this point Mr. Justice Frankfurter said:

> "But neither the fact that a State may deny the right of appeal altogether . . . sanctions differentions by a State that have no relation to a rational

> policy of criminal appeal or authorize the imposition of conditions that offend the deepest presuppositions of our society."

To refuse to hear an appellant's objections to the admission and consideration of so great a volume of highly prejudicial evidence, which the trial judge admitted he took into consideration was, in fact, just as fatal to Petitioner's appeal as was the failure of the State to furnish Griffin with a transcript.

Again in *Chessman v. Teats*, 345 U. S. 156, where this Court reversed the conviction of the appellant because the transcript on appeal was settled in his absence, Mr. Justice Harlan put this failure of the State of California to accord a hearing to appellant in these terms:

> "The proponent before this Court is not the Petitioner, but the Constitution of the United States."

By the failure of the State Supreme Court of Washington to accord Petitioner a hearing on assigned errors so fundamental and so grave, is not this statement of the rule equally applicable here?

In *Napue v. Ills.*, 360 U. S. 264, where, in a state trial, the prosecutor failed to correct the testimony of a witness known by him to be false, though it went only to the credibility of the witness, this Court held that the conviction violated due process. The trial error was far less critical and fundamental, it seems to us, than this denial of a right to be heard respecting the

highly prejudicial evidence, used with deadly effect to blacken this Petitioner, yet without giving him a chance to be heard in rebuttal of it.

That such an assumption of the trial judge's infallibility in disregarding prejudicial evidence is a mere legal fiction, under the circumstances of this case, is well expressed by Judge Sanborn in *Donnelly v. N.L.R.B.*, 123 F. 2d, 215, 224:

> "Lawyers and judges frequently differ as to the admissibility of evidence."

In the light of this well-known frequency of difference, can a court apply so recklessly as here a rule of infallible correction of a trial judge in a criminal case of such gravity?

For we bear in mind that for a man nearly 80 years old, a sentence of 15 years (App. A, p. 27a) is, in effect, a life sentence, with all the tragedy this implies to him, his family and friends. Under these circumstances, a trial freed of prejudicial error is vital.

We therefore venture to recall the language of *Lisenba v. California*, 314 U. S. 219, 236, which this Court quoted with approval in *Lyons v. Oklahoma*, 322 U. S. 596, as follows:

> "The 14th amendment is a protection against criminal trials in state courts conducted in such a manner as amounts to a disregard of 'that funda-

> mental fairness essential to the very conduct of justice, and in a way that necessarily prevents a fair trial.' "

And, to much the same effect, we quote Mr. Justice Frankfurter, in *Irvin v. Dowd*, 366 U. S. 717, 729, as follows:

> "One of the rightful boasts of Western civilization is that the State has the burden of establishing guilt solely on the basis of evidence produced in court and under circumstances assuring an accused all the safeguards of a fair procedure."

We appeal to this Court to give this Petitioner the fair trial, restricted to the crime of which he is accused, not to thrust into his trial evidence of alleged misdoings in which he had no part.

5. Prosecutor's Violation of Grand Jury Secrecy by his Wholesale Use of Evidence Taken Before the Grand Jury.

We apply yet another due process test to this trial of Petitioner. In the case of *In re Oliver*, 333 U. S. 257, 265, in defining the scope of the grand jury, this Court said:

> "Grand juries investigate . . . They do not try and they do not convict. When their work is finished by the return of an indictment, it cannot be used as evidence against the person indicted."

In flagrant disregard of this basic principle of grand jury proceedings, the trial of this case was opened with the placing of the court reporter on the stand, and

reading into the record, not merely the testimony of the Petitioner that may have been relevant to the charge of perjury, but his entire testimony before the grand jury on November 5, 1958, his first appearance, during which Petitioner was asked of a great many matters pertaining to the suspicions of the grand jury that there was misconduct between the contractor and the manager of the PUD (R. pp. 68-103, 116-153, 165-203). Somewhat later in the trial Petitioner's entire testimony, given on his second appearance before the grand jury (R. pp. 228-303) was also thrust into the record, over the objections of Petitioner's counsel. (Numerous objections were made, but they are best summarized at R. pp. 159A, 161-2, 164).

The special vice of this wholesale dumping into the record of all of Petitioner's testimony on both occasions, though the second appearance, in particular, had nothing whatever to do with the perjury charges, while at the same time Petitioner's counsel was excluded from any inspection of the grand jury's proceedings and minutes relating to Petitioner's testimony (R. p. 42) is that this action by the trial judge opened the door wide for this huge volume of prejudicial evidence concerning "Agencia Industrial," Extra Work Orders, Lynch-McClintock Co., and the $87,500 transaction between the contractor and McLean, summarized in Appendix B, none of which had anything whatever to do with Petitioner's alleged perjury, as is demonstrated by the summary of these transactions attached in Appendix B.

In short, was it due process to violate grand jury secrecy to aid the prosecution, and at the same time insist on that secrecy to hamstring the defense?

CONCLUSION

For the foregoing we respectfully submit that this petition for Writ of Certiorari should be granted.

Respectfully submitted,

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